Nebraska Law Review

Volume 51 | Issue 2 Article 7

1971

Constitutional Law—Due Process and Abortion: *United States v. Vuitch*, 402 U.S. 62 (1971)

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CONSTITUTIONAL LAW—DUE PROCESS AND ABORTION.

United States v. Vuitch, 402 U.S. 62 (1971).

Milan Vuitch, a licensed physician, was charged in the United States District Court for the District of Columbia with producing and attempting to produce abortions in violation of the District of Columbia abortion statute.[1] Before trial Vuitch made a motion to dismiss the indictment on the ground that the abortion law was unconstitutionally vague.[2] District Judge Gesell granted Vuitch's motion and dismissed the indictment[3] because the abortion law failed to "give that certainty which due process of law considers essential in a criminal statute."[4] The United States immediately appealed to the United States Supreme Court, asserting jurisdiction under the Criminal Appeals Act.[5]

The Supreme Court, in a 5-4 decision,[6] reversed the district court's ruling, holding that the statute was not unconstitutionally vague in violation of due process.[7]

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1 "Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years . . . ." D.C. CODE § 22-201 (1953).

2 The primary phrase questioned was "necessary for the preservation of the mother's life or health . . . ."

3 United States v. Vuitch, 305 F. Supp. 1032, 1036 (D.D.C. 1970).

4 *Id.* at 1034.

5 The Criminal Appeals Act allows direct appeals by the United States from district court judgments "setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded." 18 U.S.C. § 3731 (1971). It was contended that the District of Columbia abortion law was not a "statute" within the meaning of the Criminal Appeals Act because the law applies only to the District of Columbia. The majority of the Court said that the literal wording of the Act plainly included the abortion statute, and the legislative history of the Act did not show otherwise. United States v. Vuitch, 402 U.S. 62, 65 (1971). The majority did not decide whether the United States could have appealed to the Court of Appeals for the District of Columbia instead of directly to the Supreme Court.

6 The five-man majority granting jurisdiction split on the vagueness question, as did the dissenters. Those in the majority on the vagueness question were Chief Justice Burger and Justices Black, Blackmun, Harlan, and White.

7 402 U.S. at 71-72.

On the merits, the majority followed a simple two-step process. First, it held that the statute places the burden on the prosecution to plead and prove that the abortion was not necessary for the preservation of the mother's health or life.[8] The district court, relying on *Williams v. United States*,[9] had ruled that once an abortion was proved, the burden of persuading the jury that it was necessary to preserve the life or health of the mother was cast upon the physician.[10] The Supreme Court noted that such a reading of the statute was erroneous, for there then would be grave constitutional problems under the Fifth Amendment, and statutes should be construed to uphold their constitutionality. Moreover, the district court's construction of the abortion statute would contravene the legislative desire that women be able to obtain abortions needed for the preservation of their life or health.

Second, the majority held that the word "health" in the statute was not so imprecise and uncertain that it failed to inform the defendant of the charge against him.[11] Therefore, the statute was not violative of constitutional due process. The majority noted that legislative history shed no light on the problem[12] and that no cases prior to the district court decision discussed the problem.

However, while this case was being appealed, the issue was considered by the District Court for the District of Columbia in *Doe v. General Hospital*.[13] The abortion statute was there construed to permit abortions for "mental health reasons whether or not the patients had a previous history of mental defects,"[14] and the United States Court of Appeals for the District of Columbia followed that construction.[15] The United States Supreme Court accepted the construction, noting that it conformed with common usage.[16] The word "health" was then not vague, nor was the statute. In fact, it was pointed out that physicians[17] routinely decide in surgery whether an operation is necessary for the health or life of the patient.[18]

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8 *Id.*

9 78 App. D.C. 147, 138 F.2d 81 (D.C. Cir. 1943).

10 305 F. Supp. at 1034.

11 402 U.S. at 71-72.

12 The statute originally allowed abortions only to preserve the life of the mother, but in 1901 the statute was amended to allow abortions to preserve the health of the mother. There was no discussion of the statutory change at the time of the amendment.

13 313 F. Supp. 1170 (D.D.C. 1970).

14 *Id.* at 1174-75.

15 434 F.2d 423, 427 (D.C. Cir. 1970).

16 402 U.S. at 72.

17 Throughout this discussion the terms "physicians" and "doctors" will be used in their broadest sense (*i.e.*, including psychiatrists, etc.).

18 402 U.S. at 72.

The majority of the Court declined to consider contentions of unconstitutional overbreadth[19] based on *Griswold v. Connecticut*[20] because the decision in the district court rested on the vagueness ground only.[21]

ABORTION STATUTES IN GENERAL

Abortion statutes usually prohibit all abortions and then exclude special cases from the all-encompassing prohibition. However, abortion statutes vary widely as to those instances when abortions are allowed. The most restrictive statutes,[22] of which Nebraska's is typical, allow abortion only when necessary to preserve the life of the woman.[23] The term "life" in these statutes has been interpreted as meaning only physical life, that is, the exception applies only when without an abortion the woman's body would die. Arguments that "life" includes "mental life" have failed in all instances.[24]

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[19] The argument is that abortion statutes are unconstitutionally overbroad because they infringe upon a woman's rights of liberty and privacy. The Supreme Court is hearing arguments on this issue during the present term.

[20] 381 U.S. 479 (1965).

[21] 402 U.S. at 73.

[22] ALA. CODE tit. 14, § 9 (1958); ARIZ. REV. STAT. ANN. § 13-211 (1956); CONN. GEN. STAT. REV. § 53-29 (1960); DEL. CODE ANN. tit. 11, § 301 (1953); FLA. STAT. §§ 782.10, 797. 01 (1965); IDAHO CODE ANN. § 18-601 (1948); ILL. ANN. STAT. ch. 38, § 23-1 (Smith-Hurd 1970); IND. ANN. STAT. § 10-105 (1956); IOWA CODE ANN. § 701.1 (1950); KY. REV. STAT. § 436.020 (1962); ME. REV. STAT. ANN. tit. 17, § 51 (1965); MICH. COMP. LAWS ANN. § 750.14 (1968); MINN. STAT. ANN. § 617.18 (1964); MISS. CODE ANN. § 2223 (1967); MO. REV. STAT. § 559.100 (1949); MONT. REV.. CODES ANN. § 94-401 (Repl. 1969); NEB. REV. STAT. §§ 28-404, -405 (Reissue 19646); NEV. REV. STAT. §§ 200.220, 201.120 (1963); N.H. REV. STAT. ANN. §§ 585.12, .13 (1955); N.D. CENT. CODE §§ 12-25-01 to -07 (1960); OHIO REV. CODE ANN. § 2901.16 (Page 1954); OKLA. STAT. ANN. tit. 21, § 861 (1964); R.I. GEN. LAWS ANN. § 11-3-1 (1969); S.D. CODE § 13.3101 (1939); TENN. CODE ANN. §§ 39-301, 302 (1956); TEX. PEN. CODE ANN. §§ 1191-1196 (1961); UTAH CODE ANN. § 76-2-1 (1953); VT. STAT. ANN. tit. 13, § 101 (1959); WASH. REV. CODE § 9.02.010 (1956); W. VA. CODE ANN. § 61-2-8 (1967); WIS. STAT. § 940.04 (1963); WYO. STAT. ANN. § 6-77 (1959).

[23] NEB. REV. STAT. § 28-405 (Reissue 1964).

[24] *Cf.* People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969). This is probably because the common meaning of the term "life" is still physical life, not mental life. Moreover, most abortion statutes were passed before knowledge of mental health was widespread or accepted, hence, the legislatures undoubtedly meant only physical life when passing abortion legislation. It has been urged that "life" is composed of both physical and mental life, thus mental life should be included.

The Model Penal Code allows abortions performed by a licensed physician if:

> [H]e believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defects, or that the pregnancy resulted from rape, incest, or other felonious intercourse.[25]

A few states have adopted some or all of the exceptions of the Model Penal Code.[26] The District of Columbia abortion statute permits an abortion if the health or life of the mother would be gravely impaired.[27] However, the statute is not based on the Model Penal Code.[28]

Three states, Alaska, Hawaii and New York, have recently repealed their abortion laws, and now require only that the abortion be performed by a licensed physician.[29]

In many states legislation has been introduced that would drastically change the abortion statutes, and Nebraska is no exception. In 1967 Senator Carpenter of Scottsbluff introduced L.B. 45 to the 77th Session of the Nebraska Unicameral.[30] As introduced, L.B. 45 would have allowed abortions if there existed a "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother, or the pregnancy resulted from rape by force . . . or from incest."[31] Two other physicians would have to certify that the abortion was necessary for the statutory reason. The bill was amended to eliminate abortions because of impairment of mental health.[32] Subsequently, L.B. 45 was indefinitely postponed,[33] and the present law was left standing with no changes.

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[25] MODEL PENAL CODE § 230.3(2) (Prop. Off. Draft, 1962).

[26] Arkansas: (1969) text and numbering not available, formerly ARK. STAT. ANN. § 41-301 (1964); CAL. HEALTH & SAFETY CODE §§ 25951-25954 (1967); COLO. REV. STAT. §§ 40-2-50 to 52 (1967); GA. CODE ANN. §§ 26-1201, -1201 (1970); KAN. STAT. ANN. § 21-4701 (1969); MD. ANN. CODE § 43-149E (1967); N.M. STAT. ANN. §§ 40-A-5-1 to -3 (1969); ORE. REV. STAT. 435.405 - 435.990 (1953); S.C. CODE ANN. §§ 16-82 to -84, -87 to -89 (1962); VA. CODE ANN. §§ 18. 1-62 to 62.3 (1960).

[27] D. C. CODE § 22-201 (1953).

[28] The exception in the statute was inserted in 1901. W. ABERT, THE COMPILED STATUTES IN FORCE IN THE DISTRICT OF COLUMBIA, c. XVI, at 158-159 (1894).

[29] ALASKA STAT. § 11.15.0 0 (1962); HAWAII REV. LAWS § 453-1 (1959); N.Y. PEN. LAWS § 125.05 (McKinney 1967).

[30] NEB. LEG. J., 77th Sess. 29 (1967).

[31] *Id.* at 447-48.

[32] *Id.* at 543.

[33] *Id.* at 50.

The Supreme Court of Nebraska has had only three occasions to interpret the Nebraska abortion statute, the last in 1946.[34] The constitutionality of the statute has never been challenged.[35]

IMPLICATIONS OF *VUITCH*

One of the primary reasons for placing on the prosecution the burden to plead and prove that the abortion was unnecessary to preserve the life or health of the mother was to avoid constitutional problems under the Fifth Amendment. Placing the burden of proof of necessity on the defendant after the act of an abortion is proved amounts to a presumption that the abortion was not necessary. In *Tot v. United States*[36] the test of constitutionality of penal statutory presumptions under the Fifth Amendment was set out:

> A statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience.[37]

The fact that the defendant has the better means of obtaining information does not justify placing on him the burden of going forward with the evidence.[38] In *Leary v. United States*[39] the same test was employed.[40] The Court in *Leary* went on to state that great weight must be given legislative determinations,[41] but if a presumption is "highly empirical," available pertinent material must be canvassed to insure the validity of the factual presumption.[42] Moreover, the reviewing tribunal must inspect not only the data available at the time the statute was passed, but also recent

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[34] Hans v. State, 147 Neb. 730, 25 N.W.2d 35 (1946); Rice v. State, 120 Neb. 641, 234 N.W. 566 (1931); Edwards v. State, 79 Neb. 251, 112 N.W. 11 (1907).

[35] Nebraska also has a foeticide statute, NEB. REV. STAT. § 28-404 (Reissue 1964), which differs from the abortion statute in two ways: (1) the foeticide statute involves only pregnant women with vitalized fetuses; (2) the intent required is to kill the fetus, not to cause a miscarriage. The foeticide statute has been challenged on constitutional grounds and has been held valid, but a vagueness argument was not urged. Hans v. State, 147 Neb. 7, 22 N.W.2d 385 (1946).

[36] 319 U.S. 463 (1943).

[37] *Id.* at 467-68.

[38] *Id.* at 469.

[39] 395 U.S. 6 (1969).

[40] *Id.* at 36.

[41] *Id.*

[42] *Id.* at 38.

information.[43] It seems that a paucity of substantiating information at either time would invalidate the statute.[44]

Several problems concerning present abortion statutes thus become evident.[45] First, the Supreme Court in *Vuitch* plainly intimates that the presumption of guilt in the abortion statute is not rationally connected to the proof of an abortion.[46] Undoubtedly, all abortion statutes presuming a defendant guilty after proof of an abortion would fail to meet the *Tot* and *Leary* test. Moreover, in most cases a state supreme court would not be able to put a validating gloss on the state abortion statute for most attacks on abortion statutes are made in federal courts. Since federal courts are bound by state supreme court constructions of state statutes,[47] any state abortion statute which by its terms or by state judicial decisions presumes a defendant guilty after proof of an abortion would undoubtedly violate the Fifth Amendment.

Nebraska's abortion statute has been interpreted as requiring the prosecution to prove that the abortion was not necessary to preserve the life of the mother.[48] However, the other part of the disjunctive exculpatory clause of the abortion statute[49] might be a problem. No decision of the Supreme Court of Nebraska has specifically discussed whether the prosecution must prove that two

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[43] *Id.*

[44] Insufficient data at the time of passage would seem to render the act void in the inception, and hence, void today; insufficient data at the present would render the statute void at the present although valid when passed. *Id.* at 38, 53-54.

[45] It should be noted that abortion statutes are penal statutes and, as such, all elements of criminal law are necessary and relevant. This should be kept in mind in the ensuing discussion, particularly in regard to the burden of proof.

[46] 402 U.S. at 70.

[47] Erie Ry. v. Tompkins, 304 U.S. 64 (1938). For a discussion of the weight to be given state court constructions and interpretations see C. WRIGHT, LAW OF FEDERAL COURTS § 58 (1970).

[48] Rice v. State, 120 Neb. 641, 234 N.W. 566 (1931).

[49] "[O]r shall have been advised by two physicians to be necessary for that purpose . . . ." NEB. REV. STAT. § 28-405 (Reissue 1964). The Supreme Court of Nebraska has indicated that the prosecution must plead that the defendant was not advised by two physicians. Rice v. State, 120 Neb. 641, 647, 234 N.W. 566, 569 (1931). The court impliedly accepts as correct a trial court instruction that the prosecution must prove that the defendant does not fall under either of the exculpatory clauses, but, in the next paragraph, the majority intimates that the defendant had claimed he fell under the exculpatory clauses, so the instruction is probably based on the facts of the case (*i.e.*, an asserted defense) and not on the statute.

physicians did not in fact certify that the abortion was necessary.[50] However, the Nebraska abortion statute was copied from the Ohio abortion statute,[51] and that law has been interpreted as requiring only that the prosecution prove the abortion not necessary, the burden then shifting to the defense to prove that two physicians certified the abortion as being necessary.[52] It is highly probable that Nebraska state courts have followed this interpretation.[53] If so, a constitutional problem would be present for the statute must be taken at face value,[54] and this would mean that proof of an abortion would imply a lack of certification of necessity by two physicians. It is irrelevant that a proven lack of necessity would imply lack of certification of necessity. The act prohibited by the statute is the *abortion,* and the abortion is the fact which must imply lack of certification. It could be argued that the basic fact prohibited is an unnecessary abortion, and proof of that gives rise to an inference that a certification of necessity was not obtained. This argument strains the wording of the statutes too much. Thus, if the Nebraska abortion statute does not require the prosecution to plead and prove that the abortion was *not* certified by two physicians as necessary to preserve the life of the mother, it is probably violative of the Fifth Amendment and, hence, unconstitutional.

It is pointed out by the majority in *Vuitch* that when an exception is in the enacting clause, the burden is on the prosecution to plead and prove that the defendant does not fall in any of the exceptions.[55] A few states have exceptions to their abortion statutes in separate sections or statutes.[56] These statutes ostensibly are not affected by the burden of proof rule of *Vuitch.* However, by the weight of authority, when evidence appears which tends to bring the defendant within an exception not contained in the enacting clause, the burden of proof is upon the prosecution to overcome that evidence beyond a reasonable doubt.[57] The Supreme Court clearly felt that proof of an abortion does not imply the abortion

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50 NEB. REV. STAT. § 28-404 (Reissue 1964).
51 OHIO REV. CODE ANN. § 2901.1 (1953).
52 Moody v. State, 17 Ohio St. 110 (1886).
53 *See* cases cited and discussion at notes 35 and 50 *supra.*
54 Leary v. United States, 395 U.S. 6, 37 (1969).
55 402 U.S. at 70.
56 COLO. REV. STAT. ANN. §§ 40-2-50 to -52 (1967); GA. CODE ANN. §§ 26-1201,-1202 (1970); LA. REV. STAT. § 14.87 (1951), § 37.1285 (1964); N.H. REV. STAT. ANN. §§ 585.12, .13 (1955); N.M. STAT. ANN. §§ 40-A-5-1 to -3 (1969); S.C. CODE ANN. §§ 16-82 to -84, -87 to -89 (1962); TEX. PEN. CODE ANN. §§ 1191-96 (1961).
57 F. WHARTON, CRIMINAL EVIDENCE § 20 (12th ed. 1955).

was not necessary to preserve the life or health of the mother.[58] In fact, buttressed by the high esteem afforded the medical profession, proof of an abortion undoubtedly implies that the abortion was necessary. Thus proof of an abortion, a requisite for conviction under any abortion statute, automatically brings the accused physician within the statutory exception of necessity. Therefore, even in those abortion statutes not containing the exceptions in the enacting clause, the burden is on the prosecution to prove beyond a reasonable doubt that the defendant does not fall under any exceptions of necessity.

Requiring the prosecution to prove beyond a reasonable doubt that the defendant does not fall under any of the exceptions of the applicable abortion statutes[59] places a very heavy burden of proof on the state. It is very difficult to prove a doctor's prognosis incorrect for the attending physician knows the peculiar details of the patient's health, and other physicians are extremely reluctant to second-guess their colleagues.[60] The more exceptions there are in the statute, the more difficult the burden becomes. The criteria for some exceptions[61] are so physically unascertainable that proof is effectively precluded in all but the most flagrant cases. A redeeming factor for the prosecution is that circumstantial evidence can be sufficient to convict a defendant,[62] and because statutory exceptions often overlap to some degree, the same evidence might be used to prove the defendant does not fall under several statutory exceptions.[63] This is most obvious where certification by two physicians that an abortion is legally necessary is a statutory exception.[64] Proof of the non-existence of the substantive exception (the necessity of the abortion for some reason) strongly implies lack of certification of necessity for that exception. Therefore, although a much heavier evidentiary burden is probably cast on the prosecution in

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58 402 U.S. at 70.

59 *Id.*

60 This is very apparent in medical malpractice tort cases. Physicians will understandably be more reluctant to testify in abortion cases where the penalty is imprisonment and not merely damages.

61 For example, one common exception is to preserve the mental health of the mother.

62 As long as guilt is established beyond a reasonable doubt. Rice v. State, 120 Neb. 641, 647, 234 N.W. 566, 569 (1931). *See also* F. WHARTON, CRIMINAL EVIDENCE § 12 (12th ed. 1955).

63 For example, the Model Penal Code allows abortions for, *inter alia*, incest, rape or felonious intercourse. Simply proving that the father of the child was the woman's husband would preclude exculpation under these exceptions. MODEL PENAL CODE § 230.3 (Prop. Off. Draft, 1962).

64 NEB. REV. STAT. § 28-405 (Reissue 1964).

many states because of *Vuitch*, it is not an impossible burden, and in some states (*e.g.*, Nebraska) the burden is essentially the same as before *Vuitch*.

The problem of the vagueness of the words in present abortion statutes was not resolved with finality in the *Vuitch* majority opinion. However, what the majority did not say but seemed to assume is important. The district court's interpretation of the word "health" was not definitive but was accepted as sufficient for due process. Apparently, the majority felt a strong presumption of validity was present. The defendant could not have known of the true meaning of the statute until the subsequent decision of the district court interpreted the statute, so Dr. Vuitch could not have had notice of the applicable test to ascertain guilt.[65] Moreover, although abortions under the word "health" are allowed for mental health reasons, just what mental health reasons fall under the exception were never mentioned,[66] hence the applicable statutory test of guilt is still uncertain.[67]

Two major implications of the majority's position arise. First, the majority was willing to give the word "health" a broad meaning, at least to the extent of including mental health.[68] They noted that this interpretation conformed to present common usage. In construing abortion statutes, state supreme courts can undoubtedly turn to the present usage of various terms if strong evidence of legislative intent is lacking. Moreover, since the Supreme Court was quite willing to accept a liberal interpretation of the word "health," might not a similar interpretation be applicable to the word "life?" Could not "life" include both physical and mental life? That is, if a statute allows an abortion only to preserve the "life" of the mother, would an abortion be allowable if there were a good chance that requiring

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[65] Vagueness in regard to the applicable test to ascertain guilt has in the past been a ground for holding the statute violative of the due process clause. Winter v. New York, 333 U.S. 507, 509 (1948); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[66] 402 U.S. at 74, 75-76. (Douglas, J., dissenting).

[67] *See note* 65 *supra.*

[68] An indication of how the expert medical testimony (relating to the criteria for granting abortions for mental health reasons) might be handled by the trial court is found in the progression of cases involving the criteria for the insanity defense in the District of Columbia. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954); Carter v. United States, 274 F.2d 572 (D.C. Cir. 1959); McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962); Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967) (and the appendix to the opinion concerning the court's instruction to expert witnesses in cases involving the defense of insanity).

the mother to carry the child to full term would so affect her mentally that she would have to be hospitalized in a mental institution the rest of her life? It is a definite possibility which might find favor with some courts.

Second, a very important implication of the majority opinion is the presumption of correctness to be afforded a physician's diagnosis. Much concern is expressed about protecting doctors and encouraging them to act without fear of prosecution.[69] The criteria of legally sufficient mental health reasons for abortions are to be determined by doctors, the majority noting that doctors routinely make such decisions.[70] The overall thrust of the opinion indicates extreme reluctance to second-guess physicians, and ways to protect doctors from vengeful juries are pointed out.[71] Practically, the majority has almost completely accepted the formulation of the statute suggested by Mr. Justice Stewart in his concurring opinion:

> [T]he question of whether the performance of an abortion is "necessary for the mother's life or health" is entrusted under the statute exclusively to those licensed to practice medicine. . . . A competent licensed practitioner of medicine is wholly immune from being charged with the commission of a criminal offense under this law.[72]

DELEGATION OF LEGISLATIVE AUTHORITY

A primary basis of *People v. Belous*,[73] the progenitor of recent abortion litigation, is that giving doctors so much discretion would be an improper delegation of legislative power to a person with a direct, pecuniary and substantial interest in the outcome of the decision and would therefore violate due process.[74]

The doctrine of unconstitutional delegation of legislative power has not had a dramatic history. Although apparently dormant for federal statutes,[75] the rule is still used to invalidate statutes and ordinances under state constitutions.[76] At present, the judicial

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[69] 402 U.S. at 70-71.
[70] *Id.* at 72.
[71] *Id.*
[72] *Id.* at 1312.
[73] 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).
[74] *Id.* at 972-73, 458 P.2d at 203-05, 80 Cal. Rptr. at 363-64.
[75] Carter v. Carter Coal Co., 298 U.S. 238, 310 (1936) (alternative holding), which is questionable law at best, is the most recent example. *Compare* Arizona v. California, 373 U.S. 54 (1963).
[76] *E.g.*, State v. Bruton, 246 Ark. 288, 437 S.W.2d 795 (1969). *Cf.* K. DAVIS, ADMINISTRATIVE LAW § 2.07 (1958); Note, *The State Courts and Delegation of Public Authority to Private Groups*, 67 HARV. L. REV. 1398 (1954).

attitude seems to be that the legislature has the authority to delegate its powers,[77] but due process requirements must be fulfilled in the authorized rule-making of the delegate.[78] Bearing in mind that the state statute must meet strict requirements, a few special due process requisites should be noted. Stringent requirements are demanded if a private individual or group is delegated power instead of a public official,[79] if the private individual or group has a self-interest in the determination it has to make[80] and especially if a penal statute is involved.[81]

By allowing doctors to determine the criteria for allowing abortions for mental health reasons the legislature has given rule-making power to a private group not responsible to the voting public. Moreover, the statute involved is penal and the medical profession has a definite interest in the criteria to be determined for (1) doctors are the individuals subject to the statute involved, (2) the individual physician is involved in the drama of the pregnant woman's plight and (3) the performance of an abortion is a means of producing income.

Analogies to medical evidence in insanity defenses and malpractice cases are not applicable for several reasons. When establishing criteria for insanity defenses doctors are not personally interested in or affected by the criteria established. Moreover, in most states the criteria are not controlling since they are only "opinions." In the malpractice cases no penal statute is involved and there are physical criteria available for the jury to assess when considering the weight to be afforded expert medical testimony. Hence, delegating to the doctor or the medical profession the authority to decide what shall and what shall not be an infringement of an abortion statute is probably violative of constitutional due process. However, the majority in *Vuitch* does not even mention the problem.

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[77] Usually this is considered under some type of "necessary and proper" clause.

[78] K. DAVIS, ADMINISTRATIVE LAW § 2.00-6 (Supp. 1971).

[79] Group Health Ins. of New Jersey v. Howell, 40 N.J. 43, 445, 193 A.2d 103, 108 (1963). The rationale behind such a holding is that private individuals and groups, unlike public officials, are not held directly accountable by the electorate.

[80] *Id.* at 446, 193 A.2d at 109. *See also* Union Trust Co. v. Simmons, 116 Utah 422, 428, 211 F.2d 196, 199 (1949).

[81] *See* Arkansas v. Bruton, 24 Ark. 288, 437 S.W.2d 795 (1969). *Compare* Wycoff Co. v. Public Service Comm'n, 13 Utah 2d 123, 369 P.2d 283, *cert. denied* 371 U.S. 819 (1962).

The door is opened by the majority to allow doctors much greater freedom in practicing medicine. In effect, doctors are told to practice as they see fit, and only the obvious cases of malpractice will be questioned. Thus, if one is a doctor, he has greater protection under some laws than non-physicians. The spectre of equal protection problems is probably skirted by arguing that giving doctors special favors in the abortion area is a legitimate rational classification and hence constitutional.[82] Perhaps this is indicative of the approach the Supreme Court will take if and when other cases involving doctors and their practice reach the Supreme Court.[83]

CONCLUSION

The majority in *Vuitch* further delineated and illustrated the requirements of due process, considering the presumption of guilt raised by the District of Columbia abortion statute and the resulting burden of proof of non-necessity which was placed on the prosecution. Commendably, the broader constitutional question raised by *Griswold* did not affect the majority. Although the majority found the statute constitutional, they did liberally construe it by allowing abortions for mental health reasons, obviously adopting a middle-of-the-road approach to a raging social issue. However, the medical profession was indirectly given much power, and only time will tell whether the faith placed in the medical profession was well-founded.

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[82] Morey v. Doud, 354 U.S. 457 (1957); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947).

[83] For example, mercy killing and the multitudinous problems surrounding the transplanting of vital organs.